Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

MELVIN GLOVER, PETITIONER

v.

CITY OF MEMPHIS, ET. AL.

On Petition For Writ Of Certiorari
To The United States Sixth Circuit Court of Appeals

APPENDIX

MELVIN GLOVER
2645 SMITH RIDGE
MEMPHIS, TN 38127
(901) 357-1177

No. 98-5141

In The

United States Court of Appeals for the Sixth Circuit

Melvin Glover,
Plaintiff-Appellant,
v.
City of Memphis, Robert Logan,
Defendants-Appellees.

Before: Ryan, Batchelder, and Clay, Circuit Judges

2645 Smith Ridge
Memphis, TN 38127
(901) 357-1177

FILED
APR 30 1999
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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Melvin Glover, a Tennessee litigant proceeding pro se, appeals a district court judgment dismissing his civil rights complaint filed pursuant to 42 U.S.C.§ 1983. He requests the appointment of counsel and the opportunity to amend his complaint. This case has been referred to a panel of the court pursuant to Rule 34(j)(l), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App., P. 34 (a).

Glover filed his civil rights complaint on October 15, 1997, against the City of Memphis and former Memphis Police Officer Robert Logan. Glover alleged that he was shot by defendent Logan on February 19, 1996 at the home of Glover's mother-in-law. It appears from the facts alleged in the complaint that Glover and defendant Logan had been involved in an ongoing dispute involving Glover's wife. Glover sought solely damages. The district court sua sponte dismissed Glover's complaint as frivolous pursuant to 28 U.S.C.A. § 1915(E)(2)(B)(I) (West 1998), after concluding that the complaint was time-barred. Reconsideration was denied. This appeal followed.

Upon de novo review, we conclude that the district court properly dismissed the complaint. *McGore v. Wrigglesworth*, 114 F.3d 601, 604 (6th Cir. 1997). Glover's complaint does not present a rational basis in law, we *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), because it is time-barred by Tennessee's one-year statute of limitations applied to personal injury actions. Tenn. Code Ann. § 28-4-3-104 (1988); *Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986).

Glover's argument that his failure to file a timely compalint should be excused because he was unable to retain counsel to represent him is without merit. If his argument is liberally construed, see *Jones v. Duncan*, 840 F.2d, 359, 361 (6th Cir. 1998), Glover is arguing that the statute of limitations should be equitably tolled in this case. Several factors are reviewed in deciding whether to apply equitable tolling, including: (1) lack of actual notice of the filing requirements; (2) lack of constructive

knowledge of the filing requirements; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendants; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement. *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988).

Glover did not plead facts that would merit tolling the limitations period. He freely admitted that he was notified by an attorney of the one year statute of limitations when the attorney decided not to pursue the civil complaint against Logan on December 20, 1996. He did not allege what attempts were made to retain an attorney or that any infirmity prevented him from retaining or consulting with other attorneys. Neither did he allege that he suffered from any infirmity which rendered him incapable of filing his lawsuit within the limitations period. He merely alleged that he was unable to find an attorney and was unaware that he could file the complaint himself. Such unsupported allegations provide no basis sufficient to toll the statute. Therefore, Glover's complaint is time-barred.

Accordingly, the requests for counsel and an opportunity to amend the complaint are denied, and the district court's judgement is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
(S/Leonard Green, clerk)

No. 97-2955-Tu/A

In The

United States District Court
for the Western District of Tennessee
Western Division

Melvin Glover,
Plaintiff,
v.
City of Memphis, et al.,
Defendants.

ORDER OF DISMISSAL
ORDER ASSESSING APPELLATE FILING FEE

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2645 Smith Ridge
Memphis, TN 38127
(901) 357-1177

Plaintiff Melvin Glover filed a complaint under 42 U.S.C. § 1983, with an application to proceed in forma pauperis on October 15, 1997. It appears from the facts alleged in the application that plaintiff Melvin Glover cannot afford the filing fee and qualifies as indigent under 28 U.S.C. 5 1915(a). The application to proceed in forma pauperis is GRANTED.

The Clerk of Court is ORDERED to file the case and to record the defendant as: City of Memphis and Robert Logan.

The Clerk shall not issue process or serve any papers until further ordered by the Court.

Plaintiff sues the City of Memphis and former Memphis Police Officer Robert Logan. Plaintiff alleges that he was shot by Logan on February 19, 1996 at the home of Glover's wife's mother. It appears from the facts alleged in the complaint that plaintiff and Logan had been involved in an ongoing dispute involving plaintiff's wife.

It is not clear from the facts alleged whether Logan was on duty and acting in the course and scope of his employment as a police officer at the time of the shooting. In order to state a S 1983 claim, plaintiff must allege action under color of state law, West v. Atkins, 487 U.S. 42, 55-57 (1988).

In any event, the shooting occurred on February 19, 1996, more than one year before the filing of this complaint on October 15, 1997. The statute of limitations in Tennessee for violations of 5 1983 is one year. Tenn. Code Ann. § 28-3-104 (1988). See, e.g., Wilson v. Garcia, 471 U.S. 261 (1985); Berrt v. State of Tennessee, 796 F.2d 879 (6th Cir. 1986). This complaint is clearly barred by the statute of limitations. While plaintiff alleges that he was hospitalized for six weeks after the shooting and the gunshot injury rendered him a paraplegic, he was able to retain an attorney to represent him during that time. Plaintiff freely admits that he was notified by the attorney of the one year statute of limitations when the attorney decided not to pursue the civil claim against Logan on December 30, 1996. Plaintiff does not allege what attempts were made in the next month and one half to retain an attorney or that any infirmity prevented him from retaining or consulting with other attorneys.

Neither does he allege that he suffered from any infirmity which rendered him incapable of filing his lawsuit within the time limit. He merely alleges that he was unable to find an attorney and unaware he could file the complaint himself. These allegations provide no basis sufficient to toll the statute.

Although the statute of limitations is normally an affirmative defense that must be raised by the defendants, "[a]n action may be dismissed under 5 1915 (d) where the defense is complete and obvious from the face of the pleadings or the court's own records." Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984).

The entire complaint lacks an arguable basis either in law or in fact, and is therefore frivolous. See Denton, 504 U.S. at 31; Neitzke, 490 U.S. at 325. As the complaint is frivolous, it is DISMISSED pursuant to 28 U.S.C. S 1915(e)(2)(B)(i).

The final issue to be addressed is whether plaintiff should be allowed to appeal this decision in forma pauperis. Twenty-eight U.S.C. § 1915 (a) (3) provides that an appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. The good faith standard is an objective one. Coppedge v. United States, 369 U.S. 438, 445 (1962). An appeal is not taken in good faith if the issue presented is frivolous. Id. Accordingly, it would be inconsistent for a district court to determine that a complaint is too frivolous to be served, yet has sufficient merit to support an appeal in forma pauperis. See Williams v. Kullman, 722 F.2d 1048, 1050 n.l (2d Cir. 1983) The same considerations that lead the Court to dismiss this case as frivolous also compel the conclusion that an appeal would be frivolous. It is therefore CERTIFIED, pursuant to 28 U.S.C. § 1915 (a) (3), that any appeal in this matter by plaintiff is not taken in good faith, and plaintiff may not proceed on appeal in forma pauperis.

The Sixth Circuit Court of Appeals decisions in McGore v. Wrigglesworth, 114 F.3d 601 (6th Cir. 1997), and Floyd v. United States Postal Service, 105 F.3d 274 (6th Cir. 1997), apply to any appeal filed by the *plaintiff in this came.*, if plaintiff files a notice of appeal, he must pay the entire $105 filing fee required

by 28 U.S.C. IS 1913 and 1917.1 The entire filing fee must be paid within thirty days of the filing of the notice of appeal.

By filing a notice of appeal the plaintiff becomes liable for the full amount of the filing fee, regardless of the subsequent progress of the appeal. If the plaintiff fails to comply with the above assessment of the appellate filing fee within thirty days of the filing of the notice of appeal or the entry of this order, whichever occurred later, the district court will notify the Sixth Circuit, who will dismiss the appeal. If the appeal is dismissed, it will not be reinstated once the fee is paid, McGore, 114 F.3d at 610.

IT IS SO ORDERED this 28th day of October, 1997.
s/JEROME TURNER
UNITED STATES DISTRICT JUDGE

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[1] The fee for docketing an appeal is $100. Us Judicial Conference Schedule of Fees, 1 1, Note following 28 U.S.C. I 1913. Under 28 U.S.C. 5 1917, a district court also charges a $5 fee.

> Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

[2] The district court may extend this deadline one time by thirty days if the motion to extend is filed within the meaning of Houston v. Lack, 487 U.S. 266 (1988), and Fed. R. App. P. 4(c) before the expiration of the original deadline. McGore, 114 F-3d at 610.